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PREPARATORY COMMISSION FOR THE
INTERNATIONAL SEABED AUTHORITY
AND FOR THE INTERNATIONAL
TRIBUNAL FOR THE LAW OF THE SEA
Special Commission 4

CHAIRMAN'S SUMMARY OF DISCUSSIONS

Addendum

Administrative arrangements, structure and financial implications of the International Tribunal for the Law of the Sea

(LOS/PCN/SCN.4/WP.8/Add.1 and Corr.1)
(LOS/PCN/SCN.4/WP.8/Add.2 and Corr.1)

A. Supplementary cost estimates reflecting alternatives as to official working languages

(LOS/PCN/SCN.4/WP.8/Add.1)

1. During the summer meetings of the eighth session of the Preparatory Commission, Special Commission 4 began the consideration of the "Administrative arrangements, structure and financial implications of the International Tribunal for the Law of the Sea - Supplementary cost estimates reflecting alternatives as to official working languages" (LOS/PCN/SCN.4/WP.8/Add.1). Although the examination of the working paper was completed at the session, it was generally agreed that some of the issues taken up in the working paper would be considered again in connection with document LOS/PCN/SCN.4/WP.8/Add.2 entitled "A scheme to phase in the establishment of the International Tribunal for the Law of the Sea".

Introduction of the working paper

2. In introducing the working paper, the Secretary pointed out that the document had been requested during the consideration of document LOS/PCN/SCN.4/WP.8, which gives the institutional structure involved with the use by the Tribunal of two working languages. In preparing the document the

secretariat had taken into account the cases of the International Court of Justice and other tribunals and courts.

3. In LOS/PCN/SCN.4/WP.8/Add.1, the secretariat had elaborated a cost estimate for the case of one working language and for six working languages, maintaining the structure detailed in LOS/PCN/SCN.4/WP.8, except as regards linguistic staff.

4. In so doing, it had not been possible to take into account the discussions in the Special Commission with regard to reducing the staff of the Registry. It therefore became necessary for another document on phasing in the Tribunal to be prepared. 1/

5. The Secretary insisted that although the working paper only gave a graphic overview, it was clear that in increasing linguistic staff, it would also be necessary to increase the administrative support. In this connection he corrected that on page 6, in the summary of recurrent financial implications, the total figure for six languages was $18,913.7 instead of $8,913.7. 2/

General remarks

6. At the start of the discussions, centring on the consideration of the different figures, several delegations pointed out the important modifications resulting from the evaluation of the cost implications of the use by the Tribunal of one, two or six languages.

7. Several delegations were of the view that, based on the comparative figures, the use of two working languages by the Tribunal was the reasonable financial alternative. It would also correspond to the existing international practice.

8. Other delegations, however, wanted a full breakdown of the figures, particularly with regard to the use of six languages by the Tribunal. They felt that the working paper lacked some information.

9. First, the Secretary clarified that the external printing referred to in the footnotes to the final table would not necessarily be done by the United Nations because of the independent status of the Tribunal. The Secretary also stated that the working paper was based on the assumption that there would be unofficial translations of the pleadings and judgments, which would be published. Official translations would require terminologists, editors, etc., and thus would be more costly. That explained the difference in the figures, taking into account that with the use of one or two working languages there would be minimal translation because the Tribunal staff could work in both languages. He insisted that such would not be the case if six languages were used by the Tribunal, because every paper would have to be concurrently translated or, whenever the need arose, would have to be simultaneously translated for the Judges. Finally, he specified that the figures for the use of six working languages did not even reflect requirements of the library and the archives.

10. Some delegations insisted that the use of two working languages, although the practice of the ICJ, for example, was not without its problems. The language issue should be considered with regard to the proper functioning of the Tribunal. Those delegations insisted that the Commission should take a flexible approach on the matter.

11. Some delegations were of the view that although the two-languages system representing the two major legal systems was an acceptable alternative, the Tribunal should be able to accept texts of the major language spoken by parties to a dispute even when it is not one of the six languages of the Tribunal.

12. With regard to the question of which languages should be used, some delegations suggested the use of English and French as being customary while others insisted that Spanish should be one of the languages used.

13. In the end, it was perceived that the question of languages could not be solved in an equitable manner, since its implications were not only financial but also substantial. The general view was thus that the Tribunal should be flexible on the question. Some delegations however reserved their final views on the matter until the consideration of LOS/PCN/SCN.4/WP.8/Add.2, which would give the general budget of a phased-in Tribunal.

B. Scheme to phase in the establishment of the International Tribunal for the Law of the Sea

(LOS/PCN/SCN.4/WP.8/Add.2)

14. During the spring meetings of the ninth session of the Preparatory Commission, Special Commission 4 began the consideration of the "Administrative arrangements, structure and financial implications of the International Tribunal for the Law of the Sea - a scheme to phase in the establishment of the International Tribunal for the Law of the Sea" (LOS/PCN/SCN.4/WP.8/Add.2). The discussions on the paper were concluded at the same session. It was agreed that delegations should first exchange general views on the document and then discuss it part by part.

Introduction of the working paper

15. In introducing the working paper, the Secretary stated that it was based on certain fundamental assumptions as well as the desire to involve minimal costs at the early stages of the Tribunal. He explained that the document took into account the experience of the United Nations and the practice of the ICJ. It was assumed that the Tribunal as provided for in the Convention, with its 21 Judges, had already been agreed upon and that it was to be composed of two chambers and would use two working languages. 3/ He explained that the working paper was based on the fact that the Tribunal would be responsible for its internal functioning and that the Convention did not stipulate that all the Judges would have to be present at headquarters. Consequently, the Secretary stated, three possibilities were pursued in the document: (A) to have two Members available at the seat of the Tribunal and the rest in their home countries (this case would entail implications for application for provisional

measures); (B) to have five Members present, enough to constitute a chamber; and (C) to have 11 Members present (which would satisfy the quorum requirement).

General remarks

16. As a general statement, several delegations stated their preference for scheme B. One delegation was of the view that since fisheries disputes, for example, might arise it was wise for scheme B to provide for the setting up of at least one chamber that could deal with such disputes. Another delegation, however, stated that although he agreed that the document was a good basis for discussion, he insisted that the Commission should not forget the principles of equitable geographical representation and the representation of the principal legal systems.

Part I. CRITERIA

and

Part II. APPROACH

17. In introducing the two parts, the Secretary stated that the criteria taken into account in formulating the different schemes were contained in Part I. He reminded the delegations that the different schemes took advantage of the fact that, although any variation in the number of elected Members would be in violation of the Convention, the Convention did not stipulate that all 21 of the Judges were to be present at headquarters. He also clarified that by establishing such schemes, it would not be possible to have equitable geographical representation all the time, nor representation of the principal legal systems. However, the Tribunal would still be able to call upon other Members, not at headquarters, in order to fulfil these requirements. He concluded his introduction by stating that in preparing the working paper, the fact had been taken into account that as the workload increased, so also would the number of active Judges. The Commission therefore could consider accepting one or more of the schemes presented in the working paper.

18. Some delegations wanted to know if, under the terms of scheme B, all five Members would have to reside at the seat of the Tribunal. One of the delegations pointed out that the ICJ experience provided that was only necessary for the President and the Registrar to reside at The Hague. Another delegation was of the view that when the Judges were not at the seat and engaging in work related to the Tribunal, they should not be paid.

19. The Secretary explained that the working paper did not require that all five Judges should be present at the seat; they should however be ready to make themselves available on short notice. This would also be reflected in the difference in remuneration. He also clarified that two legal systems were usually represented: the civil and the common legal systems. Nevertheless, he noted that recently other legal systems had been called for, e.g., the Islamic legal system.

20. In the end, one delegation pointed out that, with regard to part II, paragraph 7, of the working paper providing for emergencies and taking into account that in the initial phase the Tribunal would have a full programme of work, he was of the view that it would not be realistic to accept one scheme.

Part III. SCHEME FOR INITIAL ESTABLISHMENT OF THE TRIBUNAL AND REQUISITE REGISTRY

A. Elections

21. Some delegations were of the view that equitable geographical representation and representation of the principal legal systems should be respected whatever the scheme. One delegation wanted to know if this would be feasible when drawing lots, as provided for in article 5, paragraph 2, of the Statute of the Tribunal. In connection with that question, he wanted to know about the experience of the International Law Commission.

22. One delegation suggested that with regard to the representation of geographical regions and legal systems, there should be a quorum instituted, whatever the scheme chosen.

B. Availability of Members

23. One delegation wanted to know what was the freedom implied in paragraph 16 with regard to what a Member would be allowed to do when he was not working for the Tribunal.

24. The Secretary referred him to article 7 of the Statute of the Tribunal dealing with incompatible activities.

25. With regard to the availability of Members, some delegations pronounced themselves in favour of a gradual process in the establishment of the Tribunal that would allow for the three different schemes. It was argued that this would allow more flexibility and that a small number of resident Judges would then not be able to monopolize all the work but would rather give the opportunity to a greater number of Judges to be involved, up to the quorum required in the Statute, i.e., 11 Judges.

26. Other delegations, however, rejected both scheme A and scheme B, the latter on the grounds that it would not be useful to have five Judges if no party to a dispute chose any of them.

27. One delegation wanted to know who would finance the residence of the President. It was replied that this should be for the Commission to decide since in its letter dated 9 February 1987, Germany stated that it was willing to erect the office building and no mention had been made of the residence of the President. In this connection, one delegation drew attention to the fact that the working paper seemed to assume that the Vice-President would also reside at the seat of the Tribunal.

28. A question was also raised about how it would be decided which Judges would be active and which inactive. The Secretary responded that this would be up to the Tribunal to determine in deciding its internal functioning.

C. Remuneration of Members

29. In his introduction to this section, the Secretary stated that the salary of the residing Judges would be $100,000 per year. For those in waiting, a different scheme of remuneration had been planned, taking into account the cost-of-living allowance. In this connection, he specified that the practice of the United Nations served as model. He also called the attention of the Commission to the fact that the General Assembly had recently increased by 50 per cent the annual salary of the Judges of the ICJ. He also pointed out that the different schemes proposed would affect the number of staff of the Registry.

30. It was observed that discussions on the matter of remuneration had been held and were reflected in document LOS/PCN/SCN.4/L.14.

31. It was also clarified that assumptions in this section were made on the basis that in accordance with the different schemes, 2 and then 5 and then 11 Judges would be present at the seat of the Tribunal.

32. With regard to paragraphs 25 and 26 of WP.8/Add.2 and paragraphs 50 and 51 of WP.8, some delegations requested clarifications on the different remuneration accorded the ad hoc Members and experts in the two working papers. Clarification of the term "subsistence allowance" was also sought.

33. The Secretary explained that in the original paper, WP.8, the remuneration of the Judges was viewed in terms of two components: the annual allowance and the special allowance. In WP.8/Add.2 it had been made certain that the annual allowance would not be higher than $25,000.

34. A special allowance equivalent to a per diem had been calculated based on the comparator for Hamburg, which is The Hague. A serving Member would receive the full allowance. It had been taken into account that the ICJ made additional payments not provided for in its Statute; hence the subsistence allowance. In WP.8/Add.2, the different schemes had been elaborated in order to minimize the costs. If only a Member and not an active Member is elected, he would receive the annual allowance. However, if he worked 250 days (maximum number of days for accounting purposes), he would also get the per diem or subsistence allowance for those days. With regard to the ad hoc members or experts, they would receive a subsistence allowance. For this category, the Secretary explained that their remuneration was already a built-in cost in WP.8/Add.2. He insisted that the subsistence allowance was by nature temporary.

35. One delegation wanted to know if the President and Vice-President would be required to reside at the headquarters and their status with regard to remuneration.

36. He was referred to article 18, paragraphs 2 and 3, of the Statute requiring respectively that the President receive a special annual allowance and that the Vice-President receive one for the day he acts as President.

37. When asked whether the general philosophy behind the working paper and the institution of the subsistence allowance was attractive enough to draw high-quality Judges, the Commission expressed a large measure of general agreement on the working paper.

D. Structure and staff of the Registry

38. The Secretary stated that this section reflected, with adjustments, the experience of the ICJ. He pointed out in particular that the ICJ tended to employ multivalent staff and that this idea was outlined in paragraph 28 of WP.8/Add.2. Under it, a professional Secretary might also serve as a translator during the sessions of the Court. He also specified that although that idea was used for the General Service category, and made reference to the organizational charts of schemes A, B and C of annex I, the boxes used for convenience might not be necessary. He added that the staffing levels were consistent with the practice of the ICJ and he reminded delegations that the document had been prepared on the basis of the use of two working languages.

39. One delegation wanted to know if the salary level for the staff of the Registry was similar to that of the ICJ.

40. The Secretary replied that although it might fluctuate marginally on the basis of the location of the duty station, the level of remuneration was the same.

41. Another delegation was concerned over the fact that a limited amount of staff would be burdened with a heavy workload, if the approach outlined in paragraph 28 concerning multivalent staffing was carried out. For the initial functioning of the Tribunal, he suggested that a flexible approach be adopted that would allow recruitment of the necessary human resources.

42. Another delegation was of the view however that since it was not really possible to draw up at such an early stage a scheme that would give a maximum output, it would be preferable for the time being to retain the working paper as currently drafted by the secretariat.

43. One delegation expressed concern over whether, if at the initial phase of the Tribunal there were only two working languages, i.e., English and French, there would also be provision for some staff to work in other foreign languages. The Secretary replied that the assumption was that there would be two working languages but it had not been determined which they would be. He added that, when necessary, translation into other languages would be made available from outside sources.

44. Another delegation asked about the utilization of temporary staff, as was done by the ICJ, but which was not reflected in the working paper. The

Secretary pointed out this matter had been taken into account and was provided for in annex III under the heading "General temporary assistance".

45. With regard to the issue of the principle of equitable geographical representation as enunciated in Article 101, paragraph 3 of the Charter of the United Nations, the Secretary stated that attention had not been paid to that Article when formulating the different schemes. However, that consideration could be taken into account when drafting the staff regulations and rules.

46. In the end, there was a general agreement on section D and part IV of the document.

47. Delegations were then invited to continue the discussions on the language issue on the basis of both WP.8/Add.1 and Add.2.

48. It was recalled that several delegations had stated their preference for two working languages. They had felt that the pleadings could then be translated into the other four languages. Some delegations had even specifically identified the two official languages to be used.

49. One delegation referred to the United Nations Decade of International Law and, with a view to improving the dissemination of international law, particularly among the third world, suggested that the Tribunal use six languages. He was therefore of the view that the Commission should make the necessary arrangements towards such an end. His suggestion was supported by other delegations.

50. However, several other delegations rejected that suggestion in view of the necessity to ensure that the Tribunal was cost-effective and efficient. Those had been the main objectives that the Commission seemed to have agreed upon.

51. It was suggested that the Commission should follow the experience of the ICJ on the matter, i.e., two working languages, English and French, along with informal translations into other languages. These translations could always be checked by the Tribunal or by the Parties to the dispute.

52. In that connection another delegation argued that the use of one official language would thus be even more cost-effective, and that language should be Spanish.

53. Several language combinations were suggested. One of the concerns also expressed was related to the official or unofficial character of the translations, pleadings and judgments.

54. In the matter of languages, then, no conclusive solution was arrived at as to how many and which ones would be used by the Tribunal.

55. There was a general feeling that, in the absence of such a conclusive compromise, the assumption would remain that the Tribunal would have two working languages.

56. The Commission then decided to discuss another controversial issue, namely the number of Members to be present at the seat of the Tribunal, taking into consideration the different schemes and issues involved.

57. One of the issues to be taken into account by the Commission was the question of the prompt release of vessels, which necessitated a decision by the Tribunal. This issue was raised by one representative, who argued that neither two Judges (as in scheme A) nor the special chambers could deal with the question since, according to article 292, paragraph 3, of the Convention, "the Court or Tribunal shall deal without delay with the application for release ...". He stressed the urgent character of such decisions as those involving the prompt release of vessels. He therefore suggested that, although it would be costly, the Tribunal should have available from the inception of its functioning the full quorum of 11 Members.

58. However, it was also argued that although the principles of equitable geographical representation and representation of the principal legal systems were important as they were mentioned in the Convention (article 2, paragraph 2, and article 3, paragraph 2, of the Statute of the Tribunal (annex VI)), the Commission should not ignore the necessity of attaining a cost-effective Tribunal which underlay the working paper under discussion.

59. Some delegations were thus in favour of a progressive implementation of scheme B and then scheme C. Scheme A was considered as the extreme alternative in view of the necessity to respect the above-mentioned principles. Therefore the Tribunal would first have five Members immediately available and then, as the necessity arose, would call upon six others to constitute the quorum of 11 Members.

60. Other delegations insisted that the quorum required for the Tribunal was established in the Convention at 11 Members and therefore the Commission could not provide for any less than that number. This was underscored by the necessity to maintain at all times, even with the rotation system, the principles of equitable geographic representation and representation of the principal legal systems.

61. The Secretary drew the attention of the Commission to article 16 of the Statute, which established that the Tribunal shall be responsible for its own procedure. This remark was related to the above reference to the rotation system. It was fitting for the Tribunal to respect the two principles at its own level during rotation, but also when dealing with the composition of the different chambers.

ANNEXES II AND III 4/

62. The Commission then began its discussions on annex II giving the staffing structure for three schemes (A, B, C) for the phased-in Tribunal. The Secretary introduced some corrections to WP.8/Add.2 and explained that the schemes had been based to a great extent on the ICJ, and had taken into account, in dealing with administrative activities, that the Tribunal was a judicial body. He

pointed out that it was not possible to identify every aspect or detail, hence the variations between the different schemes.

63. Some delegations were of the view that when a greater number of Members were present at the seat, this did not mean that additional administrative support would be needed. It was argued that, on the contrary, the size of the Registry staff should depend upon the caseload, as was the practice with the ICJ. One delegation pointed out that the administrative structure of the Authority seemed to be leaner than that of the Tribunal.

64. Another delegation however warned against sacrificing the efficiency of the Tribunal for a marginal cost saving. He also requested clarification as to the difference in cost of the Tribunal as outlined in WP.8/Add.2 and in LOS/PCN/WP.51, the Chairman's report.

65. The Secretary explained that the former document had sought to combine efficiency, viability and cost-effectiveness for the Tribunal. He pointed out that scheme C provided for more support services because of the amount of research work that would need to be done for the Judges. He also pointed out that the document took into account the fact that most of the ICJ cases concerned law of the sea matters. He added that the difference between LOS/PCN/WP.51 and LOS/PCN/SCN.4/WP.8/Add.2 was attributable to the fact that the Office of Programme Planning, Budget and Finance of the United Nations Secretariat had advised that the staff costs were inadequate. Scheme B in WP.8/Add.2, drafted subsequently, was the closest to realistic estimates.

66. Concerning annex III, the Secretary pointed out that the variations in the schemes with regard to the expenditures for temporary assistance were related to the fact that the Registry of ICJ had warned that it was difficult to recruit qualified short-term staff. Also, a minimal structure would need to be supplemented by temporary staff for the workload increase. Otherwise, he explained that the same caseload had been assumed for schemes A, B and C (para. 27 of the main document). He added that since the costs of printing at headquarters (i.e., Hamburg) were not known, the figure from the nearest duty station, The Hague, had been used.

67. One delegation asked about the difference between schemes A and C with regard to the cost for official travel.

68. The Secretary explained that under scheme A more travel would be required to constitute the chambers, while under scheme C, a sufficient amount of Members would already be available at the seat, and hence less travel would be required.

69. Other delegations wanted to know why common staff costs grew from scheme to scheme and while the representation allowances remained constant over the three schemes.

70. The Secretary stated that common staff costs represented a supplement to the established posts and reflected allowances to be paid to the staff, such as education grant, installation grant, home leave, etc. He also explained that the representation allowance was only paid to the Registrar, hence the constant figure.

71. The Commission thus completed its consideration of document LOS/PCN/SCN.4/WP.8/Add.2.

72. The Chairman would appreciate being apprised of any matter of consequence not reflected in the present summary.

Notes

1/ See document LOS/PCN/SCN.4/WP.8/Add.2 entitled "A scheme to phase in the establishment of the International Tribunal for the Law of the Sea".

2/ See LOS/PCN/SCN.4/WP.8/Add.1/Corr.1.

3/ Alternatives to using two working languages were provided in document LOS/PCN/SCN.4/WP.8/Add.1.

4/ Annex I contains organizational charts for schemes A, B and C.